

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY FISHER and U.S. POSTAL SERVICE,
KERSEY POST OFFICE, Kersey, CO

*Docket No. 00-2019; Submitted on the Record;
Issued February 20, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of the November 19, 1998 decision to terminate her compensation.

On May 22, 1989 appellant, then a 40-year-old rural letter carrier, caught a falling mail case that had been hit by a mail gurney. Appellant claimed that she sustained pain to her neck, shoulder, back, knees, pelvis, breastbone, jaw, eyes and ears. Appellant received continuation of pay for the period May 26 through 29, 1989 and resumed work on May 30, 1989. In a June 14, 1989 letter, the Office informed appellant that it had accepted her claim for multiple subluxations. The Office subsequently accepted appellant's claim for lumbar strain, cervical strain and strain of the right hand.¹ Appellant lost intermittent time from work while performing light duty until May 5, 1990, when she stopped working completely. The Office began payment of temporary total disability, effective May 6, 1990.²

¹ In a March 2, 1990 letter, appellant indicated that she was injured at work on May 22 and June 5, 1989. In an April 3, 1990 report, Dr. Craig A. Smith, a chiropractor, stated that on June 5, 1989, the same piece of furniture that fell on May 22, 1989 fell again on June 5, 1989 and struck appellant in the right shoulder. There is no record that appellant filed a notice or a claim for the June 5, 1989 incident.

² In an October 19, 1990 decision, the Office denied appellant's claim for compensation and chiropractic care of multiple subluxations on the grounds that the medical evidence of record showed that presence of multiple subluxations had been negated. Appellant requested a written review of the record by an Office hearing representative. In a February 22, 1991 decision, the Office hearing representative found that the weight of the medical evidence established that appellant had no subluxations. She, therefore, affirmed the Office's October 19, 1990 decision. Appellant requested reconsideration of the February 22, 1991 decision. In a July 7, 1992 merit decision, the Office denied appellant's request for modification of the prior decisions. Appellant appealed to the Board. In a January 7, 1994 decision, the Board found that appellant had not established that she had sustained subluxations of the spine. It, therefore, affirmed the decisions of the Office. (Docket No. 93-138, issued January 7, 1994).

In a November 19, 1998 decision, the Office terminated appellant's compensation, effective December 4, 1998, on the grounds that there was no current medical evidence to support a work-related condition or disabling residuals. In a November 17, 1999 letter, appellant requested reconsideration and submitted legal arguments and additional medical evidence in support of her request. In a December 2, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was repetitious and, therefore, insufficient to warrant review of the prior decision.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year prior to the filing of an appeal with the Board.³ As appellant filed her appeal on March 7, 2000, the Board only has jurisdiction to consider the Office's December 2, 1999 decision.

The Board finds that the Office improperly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁶

The Office based its decision to terminate appellant's compensation on the October 12, 1998 report of Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon, to whom the Office referred appellant for an examination and second opinion. Dr. Hrutkay diagnosed a history of cervical and lumbar strain secondary to the May 22, 1989 employment injury, chronic pain in the neck, upper right area of the back, degenerative disc disease of C5-6 with disc bulge and disc protrusion at L5-S1 with an L4-5 disc bulge. He stated that appellant had no positive objective neurologic findings involving the arms or legs and positive Waddell signs with testing of the lumbar region. Dr. Hrutkay concluded that appellant had no objective findings to support ongoing work-related conditions of cervical or lumbar strain.

Appellant submitted a November 2, 1998 report from Dr. Nora MacDonald, an osteopath, who stated that appellant's injured C5-6 disc was related to the employment injury and caused headaches, pain in the upper back and chronic pain and weakness in the neck. Dr. MacDonald

³ 20 C.F.R. § 501.3(d).

⁴ 20 C.F.R. § 10.608(b).

⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

reported that the injury to appellant's right arm from the employment injury caused loss of motion in the hand and difficulty in grasping and recurrent pain. She indicated that appellant had constant low back pain, secondary to the disc damage to L4-5 and L5-S1, which interfered with appellant's movement. Dr. MacDonald commented that appellant also had intense emotional pain and psychological distress arising from the actions of her supervisor. She stated that cervical and lumbar magnetic resonance imaging (MRI) scans showed herniation of the C5-6 and L5-S1 discs, which were directly related to appellant's employment injury.

The Office, in its decision to terminate appellant's compensation, discounted Dr. MacDonald's report on the grounds that she gave an inaccurate history of a June 5, 1989 employment injury, reported objective findings where x-rays and an MRI scan taken in 1989 and 1990 were reported as normal and gave no rationale on how appellant's conditions were related to the employment injury nine years earlier. In her request for reconsideration, appellant presented a new legal argument, that her compensation should have been terminated without referring her to an impartial medical specialist to resolve the conflict in the medical evidence between Drs. Hrutkay and MacDonald. The Office, in denying appellant's request for reconsideration, dismissed appellant's legal arguments as irrelevant. However, Drs. MacDonald and Hrutkay gave different interpretations to the medical evidence. Dr. Hrutkay stated that there was no objective evidence to support appellant's claim while Dr. MacDonald stated that MRI scans showed herniated cervical and lumbar discs. Dr. Hrutkay stated that appellant's condition was not related to her employment injury while Dr. MacDonald related appellant's condition to the employment injury. The Office did not consider appellant's contention that the reports of Drs. Hrutkay and MacDonald caused a conflict in the medical evidence which would necessitate the referral of appellant to an impartial medical specialist.

Appellant also submitted a November 10, 1999 report from Dr. MacDonald. The Office found the report to be repetitive. She, however, gave an extensive rebuttal to the Office's grounds for finding her first report to have little probative value. Dr. MacDonald commented that appellant had sustained an injury on June 5, 1989 and sustained an occupational injury while she worked on light duty but had been prevented from filing claims for these injuries by the employing establishment. She stated that appellant's injuries were soft tissue injuries, not broken bones and, therefore, would not appear on the x-rays taken in 1989 and 1990. Dr. MacDonald noted that the 1989 MRI scan, which the Office reported as normal, was described by Dr. Donn Turner, a Board-certified neurosurgeon, as poor quality scans which were unusable for diagnostic purposes. Dr. MacDonald reviewed the medical reports in appellant's case and concluded that all the medical evidence pointed to the employment injury as the cause of appellant's condition. Dr. MacDonald's November 10, 1999 report, therefore, addressed all the deficiencies that the Office found in her previous report. The November 10, 1999 report, therefore, was essentially a new medical report, not repetitious of Dr. MacDonald's November 2, 1998 report. The Office, therefore, should have conducted a merit review of appellant's request for reconsideration, based on a new, legal argument and on new medical evidence. The case must, therefore, be returned to the Office for further appropriate review, to be followed by a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated December 2, 1999, is hereby set aside and remanded to the Office for further action.

Dated, Washington, DC
February 20, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member